Supreme Court, U.S.
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No. 90-1833

In The

Supreme Court of the United States

October Term, 1990

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

STEVEN BLOUNT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED FOR REVIEW

Whether the trial judge's order, limited in scope to barring a still-testifying defendant from discussing his ongoing testimony with his attorney during an overnight recess, violated respondent's Sixth Amendment right to the assistance of counsel.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations iii

Opinions Below 2

Statement of Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 2

Reasons for Granting the Writ 7

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Geders v. United States, 425 U.S. 80 (1976) 6, 7, 8, 9, 11, 12, 13, 14

Michigan v. Harvey, ____ U.S. ____, 110 S. Ct. 1176 (1990) 10

Mudd v. United States, 798 F.2d 1509 (D.C. Cir. 1986) 11, 12

Contents

Page

People v. Bastien, 129 Ill. 2d 64, 541 N.E. 2d 670 (Ill. Sup. Ct. 1989) 10

People v. Hagen, 86 A.D. 2d 617 (2d Dept. 1982) 6, 7, 10

People v. Narayan, 54 N.Y. 2d 106, 429 N.E. 2d 123 (1981), on remand, 88 A.D. 2d 622 (2d Dept. 1982), 58 N.Y. 2d 904, 447 N.E. 2d 51 (1983) 7, 10

People v. Stroner, 104 Ill. App. 3d 1, 59 Ill. Dec. 764, 432 N.E. 2d 348 (1982), aff'd in part and rev. in part, 96 Ill. 2d 204, 70 Ill. Dec. 722, 449 N.E. 2d 1326 (1983) 13

Perry v. Leeke, 488 U.S. 272, 109 S. Ct. 594 (1989) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

State v. Fusco, 93 N.J. 578, 461 A.2d 1169 (1983) 8

United States v. Cobb, 905 F.2d 784 (4th Cir.), cert. denied sub nom. Hatcher, Sears, Keaton v. United States, 1990 W.L. 162484 (January 14, 1991).....8, 10, 11

United States v. Romano, 736 F.2d 1432 (11th Cir. 1984), vacated in part on other grounds, 755 F.2d 1401 (1985) 12, 13

Wooten-bey v. State, 568 A.2d 16 (Md. 1990).....8, 9, 11

Statutes Cited:

28 U.S.C. § 1257(3) 2

Contents

Page

New York Penal Law § 120.05 ..... 1, 2

United States Constitution:

Sixth Amendment 2, 6, 7, 8, 9, 11, 13

Other Authority Cited:

New York State Constitution, Article I § 6 6

APPENDIX

Appendix A — Opinion of the Court of Appeals of the State of New York 1a

Appendix B — Opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department 3a

Appendix C — Excerpts of Transcript of Proceedings Dated September 30, 1987 ..... 6a

No.

In The

Supreme Court of the United States

October Term, 1990

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

STEVEN BLOUNT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Nassau County District Attorney, on behalf of the People of the State of New York, petitions for a writ of certiorari to review the order of the New York State Court of Appeals, which affirmed the order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (hereinafter "Appellate Division"), which reversed the judgment of the County Court of Nassau County (Lipp, J.), rendered October 30, 1987, convicting the respondent Steven Blount of assault in the second degree (New York Penal Law § 120.05), upon a jury verdict, and imposing sentence.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-2a) has not yet been assigned an official citation. The opinion of the Appellate Division (App., *infra*, 3a-5a) is reported at 159 A.D. 2d 579 (2d Dept. 1990).

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on March 21, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

After a jury trial in the County Court of Nassau County, State of New York, respondent was convicted of second degree assault, in violation of New York Penal Law § 120.05(2). He was sentenced, as a prior violent felony offender, to an

indeterminate term of imprisonment of 2½ to 5 years.

1. On September 24, 1986, at approximately 9:15 p.m., Kenya Baker and her cousin Derek Harris were at Covington's, a store in Freeport, Nassau County, New York, to buy food (Baker: 50-51; Harris: 91-92).[1] As they stood at the checkout counter, the respondent walked in, approached Harris, with whom he had two confrontations on a public bus a few weeks before, said "I remember you," punched him in the face, and continued to engage Harris in a confrontation before Harris left the store (Baker: 52, 57; Harris: 92-97, 99).

Upon leaving the store, Harris told an older friend, Philip Sanders, who was in the store parking lot, what had happened, and the respondent was coming in their direction (Harris: 100-101; Sanders: 196-198). Harris then saw respondent's arm swing around Sanders, and also saw a silver one-sided shiny razor in respondent's hand hit the left side of his face (Harris: 101, 104),[2] causing a deep cut between 2 to 4 inches in length. Bleeding heavily from the wound, Harris was taken to South Nassau Hospital, where Dr. Arthur Wise, a plastic surgeon, treated his wound by suturing it (Harris: 103-106; Baker: 59-60; Wise: 162; Sanders: 201). Based upon his observations that Harris' cut was a clean straight line that went through skin, fat, and muscle, Dr. Wise concluded that the wound was caused by a surgically sharp object, and was consistent with a razor blade injury (Wise: 165-166).

At trial, respondent took the stand on his own behalf and recounted an incident about two weeks prior to the date of the assault, when Harris and Harris' friends menaced him on a public

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1. Numbers in parentheses refer to page numbers of the trial transcript.

2. Sanders saw respondent smack Harris on the side of his face, but did not see anything in respondent's hand (Sanders: 201).

bus. In addition, respondent testified that he encountered Harris with some friends on a public bus about one week later. There was minimal conversation between the two before respondent got off the bus (Blount: 212-214). Respondent maintained that he then went to a Chinese restaurant, where he was assaulted by Harris and his friends as he exited, and was cut on his head (Blount: 214-215).

Respondent said that on September 24th, he entered Covington's, saw Harris, punched him in the face, and was going to throw a bottle at him but did not. Harris did not fight back and said he did not want to fight respondent (Blount: 217-218). Once Harris left the store, respondent saw him talking with Philip Sanders, and heard Harris state "that's him, let's get him," before they cornered respondent in the parking lot (Blount: 219-220). Respondent testified that he told them to stop, but they kept coming at him, so he took out the wire-cutters he had been using at work that day and swung them in the air (Blount: 220-222). When he looked up, he saw Harris's face bleeding and ran (Blount: 223).

On cross-examination, the prosecutor questioned respondent extensively regarding doing electrical work without being a licensed electrician, not feeling threatened by Harris on the night of the assault, and actually punching Harris without provocation before he cut him (Blount: 226-228). Additionally, the prosecutor attempted to have respondent more particularly describe the wire-cutters he allegedly used in self-defense against Harris.

2. Respondent took the stand on his own behalf on September 30, 1987. He had completed his direct testimony and was being cross-examined when, at approximately 4:42 p.m., the court called

an overnight recess and dismissed the jury.[3] At that time, the following colloquy took place:

> [THE PROSECUTOR]: . . . Since this is a critical point in the testimony at this point and this witness is sworn and under oath, I ask the Court to direct Mr. Cooke [defense counsel] that he not discuss this portion of the testimony with his client at this time.
>
> I believe that to do so, could result, although it is not my intention to accuse Mr. Cooke of any possible impropriety or coaching. I believe inadvertently, it could result in such an occurrence and I ask he be admonished not to discuss the case at this time with his client.
>
> THE COURT: You wish to be heard?
>
> MR. COOKE: Well, Judge, I'm really not sure how to respond to that. I would be agreeable to leave it to the Court's discretion . . . Judge, I think it has to be clarified. I certainly feel I have the right to speak to my client about his testimony.

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3. During the cross-examination of respondent that had already occurred, the prosecutor had, *inter alia*, shown respondent four types of wire-cutters in an attempt to further clarify the type of weapon respondent claimed to have used in self-defense against Harris. The description of the weapon was particularly significant because the victim testified that he saw a one-edged razor, not a wire-cutter as claimed by respondent, in respondent's hand before he was cut, which was consistent with the medical testimony that the cut on Harris's face was caused by a surgically sharp object (Harris: 101-102, 126; Wise: 165-166; Blount: 220-223, 226-228, 259-273). The record shows over ten pages of cross-examination was devoted to determining which, if any, of the wire-cutters produced was similar to the one respondent used on the night of the assault.

> [PROSECUTOR]: Judge no more than we have a right —
> THE COURT: Mr. Cooke, I'm directing you not discuss this witness' testimony at all. When he completes his cross-examination, if you want additional time to talk to him before you have a redirect, I'll consider that application.
>
> MR. COOKE: I'll take exception to the Court's ruling on that.

(273-275; App., *infra*, 7a-9a).

3. In his brief to the Appellate Division, respondent argued that the trial court's order violated his right to the assistance of counsel pursuant to the Sixth Amendment to the United States Constitution and Article I, § 6 of the New York State Constitution.[4] Respondent contended that pursuant to *Geders v. United States*, 425 U.S. 80 (1976), and despite *Perry v. Leeke*, 488 U.S. 272 (1989), the trial court's overnight ban of discussion of testimony impermissibly impinged upon his Sixth Amendment right to counsel, and required reversal. The Appellate Division agreed (App., *infra*, 3a-5a) rejecting the State's contention that this Court's decision in *Perry* authorized the trial court's limited restriction on defendant-attorney consultation about respondent's ongoing testimony,[5] and unanimously reversed respondent's

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4. Neither the Appellate Division nor the Court of Appeals decided this case on New York state constitutional grounds (*see* footnote below).

5. The Appellate Division cited its previous decision in *People v. Hagen*, 86 A.D. 2d 617 (2d Dept. 1982), in which it held that the trial judge's directive to the defendant not to talk to his attorney about his ongoing testimony during an overnight recess violated defendant's constitutional right to the assistance (Cont'd)

conviction. The New York State Court of Appeals unanimously affirmed for the reasons stated in the Appellate Division's memorandum (App., *infra*, 1a-2a).

REASONS FOR GRANTING THE WRIT

In *Geders v. United States, supra,* this Court held that an overnight ban on all defendant-attorney consultation during defendant's ongoing testimony violated his Sixth Amendment right to the assistance of counsel. The Court noted, however, that its holding did "not reach, and [did] not deal with limitations imposed in other circumstances" *Id.* at 92. In *Perry v. Leeke, supra,* the Court "consider[ed] whether the *Geders* rule applies to a similar order entered at the beginning of a 15-minute afternoon recess" (488 U.S. at 274). This Court held that the order did not violate defendant's Sixth Amendment right to the assistance of counsel. Recognizing that a defendant's Sixth Amendment right is not absolute, the *Perry* court based its decision on the brevity of the recess (15 minutes) as an indication that the defendant and his attorney presumptively would only talk about the constitutionally unprotected content of defendant's testimony.

Since *Perry,* one federal Circuit Court, as well as several state courts of last resort, have strained to reconcile both the reasoning and the lengths of recesses ruled on in *Geders* and *Perry* with the facts in their own cases. While the Fourth Circuit Court of Appeals has held that a weekend ban on defendant-attorney

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(Cont'd)
of counsel. In support, the *Hagen* court had cited this Court's decision in *Geders* and the New York Court of Appeals' decision in *People v. Narayan,* 54 N.Y. 2d 106 (1981). The latter decision, however, did not decide the substantive issue of whether barring defendant-attorney consultation during a recess was a constitutional violation because of a procedural bar. Thus, it is evident that the Appellate Division's reversal in the case at bar was based on federal constitutional law.

discussion of his ongoing testimony was closer to the *Geders* facts than the *Perry* facts, and the New Jersey State Supreme Court has held the same to be true in a case which is factually indistinguishable from the case at bar, the Supreme Court of Maryland has ruled that defendant's Sixth Amendment rights were not violated by a two hour ban on defendant-attorney discussion of his ongoing testimony. The Maryland Court noted that fairness required uninfluenced testimony from all witnesses, but that a long recess with the same content restriction would have been controlled by *Geders*. We believe the instant case presents a good opportunity to resolve the important federal question of whether the *Geders* and *Perry* decisions turned upon the content of the orders or the length of time over which they were imposed.

1. The federal question presented is important to the criminal justice system. Prior to *Perry*, a myriad of federal and state courts interpreted *Geders* in a variety of ways regarding the constitutionality of orders barring a criminal defendant's access to his attorney during a trial recess. *See Perry*, 488 U.S. at 277 n.2. After this Court's decision in *Perry*, the Fourth Circuit Court of Appeals held that the trial court's ban on a testifying defendant's weekend discussion with his attorney about his testimony violated defendant's Sixth Amendment right to the assistance of counsel because of the length of that recess. *United States v. Cobb*, 905 F.2d 784 (4th Cir.), *cert. denied sub nom. Hatcher v. United States*, 1990 W.L. 162484 (January 14, 1991). In *State v. Fusco*, 93 N.J. 578, 461 A.2d 1169 (1983), the New Jersey Supreme Court held that the trial court's overnight ban on defendant-attorney discussions of his ongoing testimony violated his constitutional right to the assistance of counsel due to the length of the ban. However, in *Wooten-bey v. State*, 568 A.2d 16, 19-20 (Md. 1990), the Maryland Supreme Court found a two-hour ban of conversations concerning defendant's ongoing testimony passed constitutional muster because of the integral truth-finding function of an uninfluenced adversarial cross-examination. Even so, the

Wooten-bey court inconsistently noted that such a restriction would have violated the Sixth Amendment had the recess been "lengthy." *Wooten-bey, supra* at 20. Because of the confusion exhibited by both federal and state courts regarding the underlying rationale of this Court's decisions in both *Geders* and *Perry*, we believe the instant case presents an opportunity for this Court to decide the constitutionality of bans on defendant-attorney consultations which are limited to the ongoing testimony of the defendant.

2a. The New York State Court of Appeals erred in affirming the Appellate Division's decision that the trial court's order violated respondent's right to assistance of counsel. In *Perry*, this Court wrote extensively on the importance of cross-examination to the truth-seeking function of the trial. The Court stated "that when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while his is testifying." 488 U.S. at 284. The Court distinguished its holding in *Geders* as follows:

> The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the context of the defendant's own testimony — matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. *It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess.*

Perry at 284 (emphasis added). Thus, based on this Court's recognition in *Perry* that a defendant does *not* have

"a constitutional right to discuss testimony while it is in progress"[6] (*id.* at 284), coupled with the trial court's *limited directive to defense counsel not to discuss the defendant's testimony during the overnight recess,* respondent's constitutional right to the assistance of counsel was not violated.[7]

Since this Court's decision in *Perry*, only one federal Circuit Court of Appeals has decided a case wherein a defendant being cross-examined was barred for more than a "brief" period of time from conferring with his attorney about the content of his ongoing testimony. In *United States v. Cobb, supra,* 905 F.2d 784, the court reversed defendant's conviction where the limited ban upon defendant-attorney consultation on the defendant's ongoing testimony occurred over a weekend recess (Friday at 4:45 p.m. to the next Monday at 1:30 p.m.), although defendant and counsel were free to confer with each other about anything else. The *Cobb* court agreed that once a criminal defendant took the witness stand his truthfulness would be best tested by uninterrupted cross-examination, but found a weekend recess went too far and

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6. Although arising in different factual context from the case at bar, some cases have cited *Perry* for its recognition of the importance of cross-examination in the truth-finding process. *See Michigan v. Harvey,* ____ U.S. ____, 110 S. Ct. 1176, 1184 (1990)(Stevens, J., dissenting)(police induced and invalid waiver of the Sixth Amendment rights did not preclude use of statement to impeach defendant's false or inconsistent trial testimony); *People v. Bastien,* 129 Ill. 2d 64, 541 N.E. 2d 670 (Sup. Ct. 1989) (statute permitting child abuse victim's videotaped testimony without provision for contemporaneous cross-examination violated the Confrontation Clause because of the importance of cross-examination in the truth-finding process).

7. Notably inconsistent with its order in the instant case, the Appellate Division, post *Hagen* [86 A.D. 2d 617 (2d Dept. 1982)], "reject[ed] the notion that every restriction upon a defendant's access to his attorney constitutes reversible error per se." *People v. Narayan,* 88 A.D. 2d 622, 623 (2d Dept. 1982). The Appellate Division found it significant that the trial court in *Narayan* "unlike in *Geders* . . . , did not prohibit all conversation but only discussion of the defendant's testimony." *Ibid.*

must give way to the protections of the Sixth Amendment. Significantly, the court stated that "[t]he reasoning of *Geders* is even more persuasive here, where the recess in question was not *merely one night,* but an entire weekend." *Cobb, supra* (*emphasis added*). Hence, it appears that the *Cobb* court may have decided the case at bar, which involved only an overnight recess, in favor of the State, but for the wrong reason (*i.e.*, that time is the factor controlling the constitutionality of the order).

In *Wooten-bey v. State, supra,* 586 A.2d 16, the Maryland Court of Appeals upheld the conviction of a defendant who, during defense counsel's direct examination of him, was prohibited from speaking with his attorney during a two-hour lunch break about any of his prospective testimony. Although counsel objected, he abided by the court's ruling and was given adequate time to consult with the defendant after he had been completely cross-examined. *Id.* at 17. The court, heavily relying on *Perry*, gleened from that decision a "line of constitutional dimension" which recognized that once a defendant places himself at the heart of the truth-finding trial process by becoming a witness, he is subject to the same rules as other witnesses, and is not entitled to consult with his attorney during his testimony. *Wooten-bey, supra* at 19. The court further found the policy consideration involved to be the fairness of requiring uninfluenced continuous testimony as a way by which to measure the veracity thereof. *Id.* at 20.[8]

2b. In the state appellate courts, respondent relied on the decisions in *Mudd v. United States,* 798 F.2d 1509 (D.C. Cir.

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8. Although the basis of the court's decision appears to have been the recognition that no defendant has the constitutional right to consult with counsel while his testimony is in progress and that unadulterated testimony is of overriding concern to the trial's truth-finding function, in a footnote the court inconsistently distinguished the facts before it from those in *Geders*, stating that in a long recess (*e.g.*, overnight) the unrestricted right to counsel would be controlling. *Wooten-bey, supra* at 20, fn. 4.

1986) and *United States v. Romano*, 796 F.2d 1432 (11th Cir. 1984), *vacated in part on other grounds*, 755 F.2d 1401 (1985), both of which were decided almost exclusively on the reasoning in *Geders* and before *Perry*. In *Mudd*, the court found defendant's Sixth Amendment right to the assistance of counsel was violated by the trial judge's instruction to "defense counsel not to speak with his client about the latter's testimony over a weekend recess." *Id.* at 1510. In finding a constitutional violation, the court rejected the government's contention that the court's direction not to discuss defendant's testimony differed materially from the court's direction to the defendant in *Geders* not to speak to his lawyer about "anything." The *Mudd* court[9] interpreted *Geders* as "forbid[ding] prohibitions on attorney/defendant discussions of the defendant's testimony during a substantial recess, not just blanket prohibitions during such a recess." *Mudd, supra* at 1512. In *Perry*, however, the Court found that the defendant has no "constitutional right to discuss his testimony with his attorney while it is in process" (488 U.S. at 284). The only logical implication is that an order of a trial judge limited in scope to directing no attorney/defendant discussion about defendant's ongoing testimony would be proper. Hence, inasmuch as *Perry* removed the underpinnings of the *Mudd* decision, *Mudd* is no longer persuasive authority.

Romano, too, involved a trial court's order forbidding the defendant from consulting with his attorney concerning his testimony during an overnight recess which ultimately extended several days. In reversing, the court relied in part on cases decided by the courts of appeal in other Circuits. *Id.* at 1436-1437. The holdings in those cases are of questionable validity in the aftermath

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9. The government argued that the distinction was crucial because pursuant to the trial judge's directive, Mudd, unlike the defendant in *Geders*, could still help counsel plot strategy and tactics, pursue leads, and discuss some of the day's events. *Mudd, supra* at 1511.

of *Perry*. The *Romano* court also placed great emphasis on the failure of the *Geders* court to "indicate that a restricted prohibition against talking with a defendant about his testimony" would not run afoul of a defendant's Sixth Amendment entitlement to the effective assistance of counsel. *Id.* at 1437. Again, this Court's decision in *Perry* suggests that a restricted prohibition against talking with a defendant about his testimony would pass constitutional muster.[10]

Moreover, if defense counsel has a legitimate reason to speak to defendant during his ongoing testimony, or if he is not sure whether his intended conversation would violate the court's order, he can ask the court for an advance ruling. Furthermore, if counsel is concerned about prematurely revealing his trial strategy to the prosecutor, he can make his motion on the record and *ex parte*, which would also allow him to preserve the ruling for appellate review.

In sum, "the right to consult with counsel is subject to reasonable restrictions to preserve the integrity of the truth-seeking process and to maintain an orderly trial procedure" *People v. Stroner,* 104 Ill. App. 3d 1, 59 Ill. Dec. 764, 432 N.E. 2d 348, 351 (1982), *reversed on other grounds,* 96 Ill. 2d 204, 70 Ill. Dec. 722, 449 N.E. 2d 1326 (1983). Here, the court's order barring the defendant and his counsel from consulting with each other overnight about the defendant's testimony was narrow in scope and "was designed to assure the integrity of the legal process, specifically the cross-examination that would immediately commence after the recess." *Ibid.* In no way did this order preclude

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10. Notably, to interpret the decision in *Perry* as being based exclusively on the length of time covered by the trial judge's directive precluding a testifying defendant from consulting with counsel, rather than the substance of the directive, has the potential of involving the courts in a virtual endless morass of litigation to determine what time span constitutes a "brief" recess.

discussion of availability of other witnesses, trial tactics, the possibility of negotiating a plea bargain, or any other constitutionally protected consultation. Rather, the content of the trial court's order addressed the very truth-finding concern recognized in *Perry*, while respecting the defendant's constitutional rights as enunciated in the narrowly-tailored *Geders* decision. Accordingly, defendant's right to the effective assistance of counsel was not violated.

2c. Likewise, respondent's argument in the courts below, that a harmless error argument is inappropriate is devoid of merit. This Court addressed the issue of harmless error and the requirement to show prejudice in *Perry* in a different context than is presented in the case at bar. In both *Perry* and *Geders*, this Court decided that barring *all* consultation between a testifying defendant and his attorney is not subject to a harmless error argument. In so deciding, the *Perry* Court stated:

> There is merit in petitioner's argument that a showing of prejudice is not an essential component of a violation of the rule announced in *Geders* . . .. Our citation of *Geders* in this context was intended to make clear that "[a]ctual or constructive denial of the assistance of counsel *altogether* . . . is not subject to . . . prejudice analysis . . . .

Perry, supra at 278 (emphasis added and citations omitted). Thus, since the availability of a harmless error argument only has been precluded where there has been a *Geders/Perry* violation — *i.e.*, denial of defendant's unquestionable constitutional right to assistance of counsel altogether — respondent's argument that the same rule applies to his case is undermined by the fact that the respondent was not denied his right to counsel altogether, and the *Perry* Court's recognition that respondent has no constitutional right to consult counsel during his ongoing

testimony. Likewise, defense counsel's record comments clearly demonstrated that he understood the trial court's limitation to include only discussion of respondent's ongoing testimony, and that it did not prohibit any constitutionally protected right. Moreover, despite respondent's assertions in the state courts that the instant instructions limited his ability to effectively consult with his client, no legitimate reason exists to have allowed such consultation. Although respondent pointed to the necessity to discuss the advisability of possible additional defense witnesses referred to in his testimony or the need to produce the type of wire-cutters he claims to have used in self-defense, such assertions are devoid of merit. Firstly, respondent alone knew in advance what his testimony would consist of. As part of deciding if respondent would testify and preparing him for such testimony, it was defense counsel's job to thoroughly discuss possible areas and methods of cross-examination and any corroborating witnesses or evidence that he thought would enhance the credibility of respondent's testimony before respondent took the stand. That a particular attorney did not do his job should not provide him with an excuse to undermine the truth-finding process so essential to our trial system. Additionally, respondent presumptively could have spoken to his attorney between cross-examination and re-direct testimony, since the court's ruling allowed for such an application to be made at the conclusion of cross-examination. That defense counsel failed to make such an application, thereby foregoing a timely opportunity to demonstrate what he contended on appeal to be prejudice to his trial position, should not inure to his benefit.

3. Due to the widely divergent reasoning and results in the post-*Perry* cases, we believe that this case affords this Court an opportunity to resolve the important federal question of whether the constitutionality of a trial court's order barring defendant-attorney conversation about ongoing defendant testimony turns upon its content or the length of time such bar is in effect. The

widespread significance of this issue is apparent by noting the myriad of time intervals which is involved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

BRUCE E. WHITNEY
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Of Counsel

APPENDIX A — OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Honorable Sol Wachtler, Chief Judge, Presiding

No. 41

The People &c.,

Appellant,

v.

Steven Blount,

Respondent.

The appellant in the above entitled appeal appeared by Hon. Denis Dillon, District Attorney, Nassau County; the respondent appeared by Matthew Muraskin, Esq., Legal Aid Society of Nassau County.

The Court, after due deliberation, orders and adjudges that the order is affirmed for the reasons stated in the memorandum at the Appellate Division (159 AD2d 579). Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Nassau County Court there to be proceeded upon according to law.

Appendix A

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Donald M. Sheraw
Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, March 21, 1991

APPENDIX B — OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

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Z/hu

___ AD2d ___ Argued - January 29, 1990

GUY J. MANGANO, J.P.
LAWRENCE J. BRACKEN
GERALDINE T. EIBER
STANLEY HARWOOD, JJ.

2504E

The People, etc., respondent, v Steven Blount, Appellant.
(Ind. No. 64952)

DECISION AND ORDER

Matthew Muraskin, Hempstead, N.Y. (Kent V. Moston and Carol Lewisohn of counsel), for appellant.

Denis Dillon, District Attorney, Mineola, N.Y. (Bruce E. Whitney and Alexis Kriedman of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Nassau County (Lipp, J.), rendered October 30, 1987, convicting him of assault in the second degree, upon a jury verdict, and imposing sentence.

Appendix B

ORDERED that the judgment is reversed, on the law, and a new trial is ordered. No questions of fact have been raised or considered.

During the cross-examination of the defendant, the trial court directed an overnight recess, and directed defense counsel, over his objection, not to discuss the defendant's testimony with the defendant "at all". This instruction violated the defendant's right to the assistance of counsel (*see, People v. Hagen,* 86 AD2d 617). The holding of the United States Supreme Court in *Perry v. Leeke* ____ US ____, 109 S Ct 594), does not mandate a contrary result. In *Perry v. Leeke (supra,* at 602), the United States Supreme Court merely held that the "Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is good reason to interrupt the trial for a few minutes". In so holding, the United States Supreme Court stated (*Perry v. Leeke, supra,* at 602):

> "It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. *See, Geders v. United States,* 425 U.S., at 88, 96 S.Ct., at 1335. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right. But in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice."

Appendix B

Accordingly, the judgment of conviction must be reversed and a new trial ordered.

MANGANO, J.P., BRACKEN, EIBER and HARWOOD, J.J., concur.

Enter:

Martin H. Brownstein
Clerk

March 12, 1990

APPENDIX C — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED SEPTEMBER 30, 1987

[Commencing at page 148]

COUNTY COURT : NASSAU COUNTY

PART XIII

IND. #64952

THE PEOPLE OF THE STATE OF NEW YORK

-against-

STEVEN BLOUNT,

Defendant.

262 Old Country Road
Mineola, New York
September 30, 1987

B E F O R E :

THE HONORABLE HERBERT J. LIPP,

County Court Judge,
and a Jury

A P P E A R A N C E S :

(AS PREVIOUSLY NOTED.)

* * * * *

Appendix C

(The following took place in the Courtroom, outside the presence of the jury:)

THE CLERK: Indictment 64952. People versus Steven Blount.

People?

MR. MACY: Ready, your Honor.

* * *

[273] A. None of the heads are the same. These are all flatter. The pair I had was approximately about this size.

Q. Approximately the size you have in your hand now? A. Approximately this size.

Q. Let me ask you to look at the number on that. Tell us which exhibit that is? A. I can't read your writing. 14 for ID.

MR. MACY: Judge, may I approach at this time with Counsel?

Can I approach?

(Whereupon, both attorneys approached the Bench and a discussion was held off the record, outside the hearing of the jury.)

THE COURT: Members of the jury, we will recess now for the balance of the day. I ask that you return tomorrow morning at 9:30 in the morning.

Appendix C

Please continue to follow my admonition of not discussing this case among yourselves or anyone else, and continue to keep an open mind.

You are excuse for the balance of the day.

(Whereupon, the jury left the Courtroom at 4:40 P.M., and the following took place without the jury present:)

MR. MACY: Judge, I have one further application [274] to make at this time. Since this is a critical point in the testimony at this point and this witness is sworn and under oath, I ask the Court to direct Mr. Cooke that he not discuss this portion of the testimony with his client at this time.

I believe that to do so, could result, although it is not my intention to accuse Mr. Cooke of any possible impropriety or coaching, I believe that inadvertently, it could result in such an occurrence and I ask he be admonished not to discuss the case at this time with his client.

THE COURT: You wish to be heard?

MR. COOKE: Well, Judge, I'm really not sure how to respond to that. I would be agreeable to leave it to the Court's discretion. What I think Mr. Macy is trying to do is totally improper. To set himself up so that he has a great rebuttal here, Judge. I think it's going beyond the bounds of good faith.

THE COURT: I don't want to deal with that application. I just want to deal with his present application. Do you feel that is an appropriate application?

MR. COOKE: Judge, I think it has to be [275] clarified. I certainly feel I have a right to speak to my client about his testimony.

MR. MACY: Judge, no more than we have a right —

THE COURT: Mr. Cooke, I'm directing you not discuss this witness' testimony at all. When he completes his cross examination, if you want additional time to talk to him before you have a redirect, I'll consider that application.

MR. COOKE: I'll take exception to the Court's ruling on that.

THE COURT: 9:30 tomorrow morning.

(Whereupon, Court was adjourned at 4:42 P.M. until October 1st, 1987, at 9:30 A.M.)

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

No. 90-1833 (2)

In The

Supreme Court of the United States

October Term, 1990

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

STEVEN BLOUNT,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of New York

BRIEF IN OPPOSITION FOR RESPONDENT

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TABLE OF CONTENTS

Page

Reasons for Denying the Writ 1

Conclusion 6

TABLE OF CITATIONS

Cases Cited:

Geders v. United States, 425 U.S. 80 (1976).....1, 5, 6

Mudd v. United States, 798 F.2d 1509 (D.C. Cir. 1986) ..4, 5

Perry v. Leeke, 488 U.S. 272, 102 L. Ed. 2d 624, 109 S. Ct. 594 (1989) 1, 2, 3, 4, 5, 6

United States v. Cobb, 905 F.2d 784 (4th Cir.), cert. denied sub nom. Hatcher v. United States, ____ U.S. ____, 111 S. Ct. 758, 112 L. Ed. 2d 778 (January 14, 1991) 3, 4

Wooten-Bey v. State, 318 Md. 301, 568 A.2d 16 (Md. 1990) 5

United States Constitution Cited:

Sixth Amendment 4

No. 90-1833

In The

Supreme Court of the United States

October Term, 1990

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

STEVEN BLOUNT,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of New York

BRIEF IN OPPOSITION FOR RESPONDENT

REASONS FOR DENYING THE WRIT

In seeking a grant of certiorari, the petitioner argues that this Court's decision in *Perry v. Leeke,* 488 U.S. 272 (1989) so fundamentally altered its previous holding in *Geders v. United States,* 425 U.S. 80 (1986) as to authorize a state trial court to direct a defense attorney not to speak with his testifying client

concerning his ". . .testimony at all" (Petitioner's Appendix C, 9a) during a seventeen and one-half hour overnight recess.[1] This interpretation of *Perry* is incorrect. Moreover, as there is little or no disagreement within the state and federal judiciaries concerning the reach of *Perry*, and the issue is otherwise of limited import, the petitioner's writ should be denied.

Initially, it should be noted that *Perry* itself expressly recognized that in the context of lengthy trial adjournments — such as the overnight recess here — any communication between an attorney and his testifying client must *inevitably* include matters related to testimony. *Perry*, 488 U.S. at 284. In so recognizing, *Perry* made clear that in such a context, "It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling . . . [t]he fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right." *Id.* at 284. The Court has thereby determined that the appropriate manner of evaluating this issue is to look to the *length* of the adjournment, not the *content* of the attorney-client communication.

This method was deemed sound by the *Perry* majority because it serves to promote the truth-seeking function of the criminal trial, as well as to protect the right of defense attorney and client to meaningfully communicate during lengthy strategy sessions. By avoiding a content-based analysis, the Court expressly recognized that a defense attorney must be able to freely communicate with his client concerning all facets of the case during lengthy strategy sessions, and implicitly determined that there is

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1. The State's Petition neglects to note that although the trial court adjourned the case at 4:40 p.m. the respondent did not resume cross-examination the following day until 10:10 a.m.(Trial Transcript, 288-289). Thus, the period of sequestration was in excess of seventeen and one-half hours.

simply no meaningful way of constructing a sufficiently specific testimonial sequestration without running afoul of the Sixth Amendment right to counsel. *See United States v. Cobb,* 905 F.2d. 784 (4th Cir.), *cert. denied sub nom Hatcher v. United States,* ____ U.S. ____, 111 S. Ct. 758, 112 L. Ed. 2d 778 (January 14, 1991). Whatever difficulties courts may eventually face in determining whether or not trial recesses are lengthy or brief, pales in comparison to the impossible task of itemizing those specific topics which an attorney may or may not discuss with his client during overnight or over-weekend recesses.

The instant case proves the point. Here, at the time of the overnight recess, the respondent's direct and cross-examination had spanned sixty-five pages of transcript, including testimony concerning his first meeting with the complainant in September 1986, his second encounter a week later, the incident itself of September 24th, and the evening of his arrest, two days later. The testimony included mention of perhaps a dozen potential defense witnesses who might corroborate the respondent's claim that the complainant had provoked the two earlier incidents, and that the respondent had acted in self-defense on the date of incident. Simply stated, the respondent's testimony encompassed almost everything of substance concerning the case.

In the above setting, the trial court's order, "not to discuss testimony at all" effectively prohibited any meaningful communication between attorney and client concerning anything of significance at the most critical point in the case, the trial itself. It is plain that such a sweeping order denied the respondent his right to the guiding hand of counsel when it was most needed.

Since the decision in *Perry*, there has been a dearth of reported appellate cases involving testimonial sequestrations. In *Cobb v. United States, supra*, the Fourth Circuit reviewed facts strikingly similar to the case at bar. There, a trial court directed Cobb not

to speak with his attorney concerning his ongoing testimony during a weekend recess. The defendant was in the middle of cross-examination at the time of the order. On appeal, the Government advanced the identical argument as petitioner here. The court rejected the claim, noting *inter alia*:

> [t]o remove from Cobb the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan trial strategy. To hold otherwise would defy reason. How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of his case?

Id. at 792.

In reaching this conclusion the Fourth Circuit relied, in part upon *Mudd v. United States,* 798 F.2d 1509 (D.C. Cir. 1986), a pre-*Perry* decision. The *Mudd* court determined that a more narrowly drawn testimonial sequestration[2] was nonetheless violative of the Sixth Amendment:

> . . .an order such as this one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive. Consultation between lawyers and clients cannot be neatly divided into discussions about "testimony" and those about "other" matters.

---

2. The trial court in *Mudd* directed defense counsel ". . . not to talk to Mr. Mudd about his testimony between now and the time he undergoes cross-examination. You can talk to him about other things, but not about his testimony." *Mudd v. United States, supra,* 798 F.2d 1509, 1510.

Id. at 1512. In concurrence, then Associate Circuit Judge Scalia wrote:

> I agree with the majority that the District Court's order prohibiting defendant from discussing his testimony with his attorney during a weekend recess was not significantly less invasive of sixth amendment rights than the order prohibiting all contact between a defendant and his attorney during an overnight recess in *Geders v. United States*, . . . I therefore join in the majority's holdings that a prohibition on attorney client discussions during substantial recesses, even if limited to discussion of testimony, violates the sixth amendment and that, like the similar violation at issue in *Geders*, it constitutes per se reversible error.

Id. at 1515.

Petitioner points to the Maryland Court of Appeals decision in *Wooten-Bey v. State,* 318 Md. 301, 568 A.2d 16 (1990), the only case cited by petitioner which even remotely adopts the suggested content-oriented approach. There, however, the period of sequestration was a luncheon recess that spanned only seventy-five minutes,[3] a period of time deemed sufficiently brief as to trigger the separate analysis in *Perry*.

Given the paucity of reported caselaw since *Perry*, there is no basis to conclude that an issue of constitutional magnitude has been inconsistently decided within the state and federal judicial systems, or that trial courts are having difficulty reconciling *Geders*

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3. As noted in the first footnote in the decision, the luncheon recess began at 12:15 p.m. and ended at 1:30 p.m., a period of seventy-five minutes, not two hours. *Wooten-Bey v. State, supra,* 318 Md. 301, at 302-303.

and *Perry*. To the contrary, the issue has rarely arisen, and when it has, all courts have recognized the time-oriented standard of the *Geders/Perry* principles. The rules are clear and subject to application. Further elaboration is unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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